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Where Calif. Privacy Law and Employee Benefits Data Collide

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The California Consumer Privacy Act, signed into law in June 2018, is an extensive, first-of-its-kind consumer privacy law in the United States. It likely will require covered businesses with customers or employees in California to make significant changes to their data protection programs.

The CCPA will require certain disclosures in covered businesses' privacy notices, including a description of individuals' (including employees') rights under the CCPA (e.g., the right to delete their personal information). Covered businesses also must disclose certain data practices from the preceding 12 months, such as the categories of personal information they have collected about consumers.¹

The CCPA grants new privacy rights to California residents, such as:

1. The right to access certain information regarding the categories of personal information a covered business has collected about a particular consumer;²
2. The right to request that a covered business delete personal information about the consumer which the business has collected from the consumer;³
3. The right to direct a covered business that "sells" personal information about the consumer to third parties not to sell the information;⁴ and
4. The right to not be discriminated against by a covered business because the consumer exercised any of his or her rights under the CCPA.⁵

As we move closer to implementation of the CCPA in 2020, companies will need to consider how the new law could affect their operations in multiple ways — including, for example, data collected through their employee benefit plans.

Broad Application of the CCPA

The CCPA applies broadly to any for-profit business that (1) "does business in the state of California"; (2) "collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers'

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personal information”; and (3) satisfies one or more of the following thresholds: (a) has annual gross revenues in excess of \$25 million; (b) alone or in combination, annually buys, receives for the business’s commercial purposes, sells, or shares for commercial purposes, the personal information of 50,000 or more consumers, households or devices; or (c) derives 50 percent or more of its annual revenues from selling consumers’ personal information.⁶

While use of the term “consumer” may suggest a particular type of relationship, the term is defined broadly to include any California resident⁷ — and as a result, in its current form, the CCPA also will apply to information collected by covered businesses about their employees who reside in California. In addition, this broad use of the term “consumer” to apply to any California resident also means that the CCPA could apply to data collected about California residents (participants or beneficiaries) under employee benefit plans of covered businesses. Whether and to what extent this law will apply to employee benefit plans will depend in part on the type of plan and the existing legal rules for such arrangements.

Health Plans

Following its amendment in September 2018, the CCPA includes a specific exemption for protected health information, or PHI, collected by a covered entity or business associate subject to the privacy rules under the Health Information Portability and Accountability Act.⁸ Because employer-sponsored health plans are HIPAA-covered entities, PHI held by a self-insured health plan and subject to HIPAA will be outside the reach of the CCPA. The exemption also applies to PHI held by business associates, such as third-party administrators for health plans.

However, certain other health-related information that is held by an employer outside of the health plan — such as information related to disability benefits or sick leave — is not covered by this exemption and is therefore potentially subject to the CCPA, as described further below, unless otherwise exempted on another basis.

Retirement and Other ERISA Plans

The CCPA does not specifically address its application to benefit plans not covered by HIPAA, such as retirement benefits. For plans that are subject to the Employee Retirement Income Security Act, such as 401(k) plans and other qualified retirement plans, it is possible that the CCPA could be preempted by ERISA — but unlike the health plan exemption, the statute does not provide a specific carve out for ERISA plans, and therefore the exact nature and the possible extent of any preemption is unclear.

The case law regarding ERISA preemption is complex and evolving. Section 514 of ERISA states that ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan;”⁹ however, more recent case law indicates that the term “relate to” should be applied more narrowly.¹⁰ In particular, in its 2016 decision in *Gobeille v. Liberty Mutual Insurance Company*, the U.S. Supreme Court indicated that the term “relate to” should not be taken literally, and identified two key areas of preemption:

1. ERISA preempts a state law that has a “reference to” ERISA plans — meaning a law that “acts immediately and exclusively upon ERISA plans ... or where the existence of ERISA plans is essential to the law’s operation;”¹¹ and

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2. ERISA preempts a state law that has an impermissible “connection with” ERISA plans — meaning that the state law “governs a central matter of plan administration’ or ‘interferes with nationally uniform plan administration,’”¹² or “acute, albeit indirect economic effects’ of the state law ‘force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.’”¹³

In *Gobeille*, the state law in question was not specifically targeted at ERISA plans but did require various entities, including self-insured health plans and third-party administrators, to report payments relating to health care claims and other information regarding health care services. Because ERISA governs disclosure and reporting by benefit plans, the court found that the state law reporting requirement both intruded on a central matter of plan administration and interfered with nationally uniform plan administration, and therefore was preempted.¹⁴

Similarly, the CCPA is not specifically targeted at ERISA plans, and as a result the question for this purpose is whether the requirements imposed by the CCPA on ERISA plans would govern a central matter of plan administration or impermissibly interfere with nationally uniform plan administration. The CCPA imposes new requirements regarding deletion of personal information and certain disclosures regarding use of personal information. Because reporting, disclosure and record-keeping are key areas of regulation under ERISA, it is possible the law could be preempted on the basis that it impermissibly interferes with plan administration.

In the absence of further guidance, however, it is not certain to what extent preemption might apply — and it is also possible that a court could find that ERISA preempts some aspects of the law but not others. As a result, sponsors of retirement and other ERISA plans are faced with some uncertainty as to how, and to what extent, the CCPA will be applied to these benefit plans in practice.

Non-ERISA Benefits and Employment Practices

Even if the CCPA is ultimately determined to be preempted (in whole or in part) in the context of ERISA plans, in the absence of further amendments or clarification it will still apply to data collection by an employer in its capacity as an employer, as well as data related to benefits and policies not covered by ERISA.

This includes information collected by an employer in connection with administering vacation, sick leave, paid time off or leaves of absence. Other benefits that are generally not subject to ERISA (and that are therefore not subject to a potential preemption argument under ERISA) include health savings accounts, dependent care flexible spending accounts, many short-term disability plans and certain voluntary benefits.

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What's Next

The CCPA was signed by California Gov. Jerry Brown on June 28, 2018, and was amended by SB-1121 on Sept. 23, 2018. The CCPA has a compliance deadline of Jan. 1, 2020, but the amendment delays the California attorney general's enforcement of the CCPA until six months after publication of the attorney general's implementing regulations, or July 1, 2020, whichever comes first.

The California state Legislature is expected to consider more changes to the CCPA in 2019. As a result, we may receive more clarity about the application of the law in the employment and employee benefit plan context.

In the meantime, employers and benefit plan sponsors subject to the CCPA will want to consider how the new law could potentially apply to their own benefit plans and the data of their plan participants and beneficiaries. In addition, since many plans are administered by third-party record-keepers who could hold significant plan participant and beneficiary data, employers and plan sponsors may want to start by reaching out to their vendors to ask about any frameworks being put in place to comply with the CCPA.

Notes

¹ Cal. Civ. Code § 1798.130.(a)(5).

² Cal. Civ. Code § 1798.110.(a).

³ Cal. Civ. Code § 1798.105.(a).

⁴ Cal. Civ. Code § 1798.120.(a).

⁵ Cal. Civ. Code § 1798.125.(a).

⁶ Cal. Civ. Code § 1798.140.(c).

⁷ Cal. Civ. Code § 1798.140.(g).

⁸ Cal. Civ. Code § 1798.145.(c)(1)(A).

⁹ 29 U.S.C. §1144(a).

¹⁰ See *Gobeille v. Liberty Mutual Ins. Co.*, 136 S.Ct. 936 (2016); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

¹¹ *Gobeille*, 136 S.Ct. at 943 (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A. Inc.*, 519 U.S. 316, 325 (1997)).

¹² *Id.* at 943 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)).

¹³ *Id.* at 943 (quoting *Travelers*, 514 U.S. at 668).

¹⁴ *Id.* at 945.

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